92-45

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

HARRY S. STONEHILL, ET UX,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE INTERNAL REVENUE SERVICE DEPRIVED TAXPAYERS OF THEIR PROCEDURAL DUE PROCESS RIGHTS UNDER THE 5TH AMENDMENT BY LEVYING AND SEIZING THEIR PROPERTY TO COLLECT AN ALLEGED $15 MILLION IN TAXES DUE WITHOUT ONCE RENDERING ANY ACCOUNTING FOR THEIR PROPERTY SEIZED DURING 30 YEARS OF PROCEEDINGS.

II. WHETHER A CIRCUIT COURT OF APPEALS SHOULD GIVE RES JUDICATA EFFECT TO A DISTRICT COURT TAX LIABILITY JUDGMENT WHEN THE DISTRICT COURT REFUSED TO RULE ON TAXPAYERS' REPEATED MOTIONS FOR AN ACCOUNTING OF PROPERTY LEVIED UPON AND SEIZED IN SATISFACTION OF A PORTION OF THAT JUDGMENT.

III. WHETHER A CIRCUIT COURT OF APPEALS SHOULD GIVE RES JUDICATA EFFECT TO A DISTRICT COURT TAX LIABILITY JUDGMENT WHEN THE AMOUNT OF THE JUDGMENT WAS BASED UPON GROSS LEGAL AND ARITHMETIC ERRORS IN THE COMPUTATION THEREOF.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following are the names of all parties to the proceeding in the United States Court of Appeals for the Ninth Circuit from which this Petition arises.

Harry S. Stonehill, Petitioner
Lourdes Blanco Stonehill, Petitioner
Robert P. Brooks
Pacita Brooks

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

HARRY S. STONEHILL, ET UX,

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Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Harry S. Stonehill and Lourdes Blanco Stonehill, the Petitioners herein, pray the Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit by Memorandum stated by the Court as "not appropriate for publication" or citation entered on April 7, 1992. The Court of Appeals affirmed the decision of the U.S. District Court for the Northern District of California, Panner, J., entered on January 1, 1991, unreported; and a Petition for Rehearing was denied by the Court of Appeals for the Ninth Circuit on May 14, 1992. A list of further related opinions and decisions of this and other courts is set forth below in reverse chronological order:

(1) *Harry S. Stonehill, 1987 T.C.M. (P-H) ¶87,405 (T.C. Aug. 18, 1987).*

(2) *Harry S. Stonehill, 1984 T.C.M. (P-H) ¶84, 331 (T.C. June 28, 1984).*

(3) *United States v. Stonehill, 55 A.F.T.R.2d (P-H) ¶85-613 (D. Or. 1984).*

(4) *United States v. Stonehill, 702 F.2d 1288 (9th Cir. 1983), cert denied, 465 U.S. 1079 (1984).*

(5) *United States v. Stonehill, No. 65-127-GJS (C.D. Cal. Oct. 14, 1980), also entering judgment for No. 43244 (N.D. Cal. Oct. 14, 1980) and No. 2348 (D. Haw. Oct. 14, 1980).*

(6) *United States v. Stonehill, 48 A.F.T.R.2d (P-H) ¶81-5171 (C.D. Cal. May 19, 1980).*

(7) *United States v. Stonehill, 1981 U.S. Tax Cas. (CCH) ¶9370 (C.D. Cal. Apr. 19, 1980).*

(8) *United States v. Stonehill, 420 F. Supp. 46 (C.D. Cal. 1976).*

(9) *United States v. Blaustein, 27 A.F.T.R.2d (P-H) ¶71-392 (S.D.N.Y. Jan. 19, 1971).*

(10) *Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), cert denied, 395 U.S. 960 (1969), and reh'g denied 396 U.S. 870 (1969).*

(11) *United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal. 1967).*

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit by Writ of Certiorari under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered April 7, 1992.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 60(b)(5)

26 U.S.C.A. § 6601(a),(e)(2),(e)(3) (1989)

26 U.S.C.A. § 6321 (1989)

26 U.S.C.A. § 6331(a) (1989)

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INTRODUCTION

Petitioners ("the Stonehills") seek this Court's review because of profound differences in the tax computation methodology and legal interpretations used by the Internal Revenue Service ("IRS") and the taxpayers herein. The calculations vary by as much as $25,000,000 depending upon which method is used. In the process of developing its successive computations, the United States violated several of its own rules. Furthermore, the United States has *never* provided an accounting for real and personal property seized more than twenty-five years ago, notwithstanding numerous requests for one.

Indeed, this case perfectly exemplifies the plight of taxpayers when their real and personal property is subject to widespread multiple levies, seizures, and jeopardy assessments over long periods of time. Despite repeated motions and requests for an accounting between 1967 and 1991 for property worth millions of dollars, the Court of Appeals for the Ninth Circuit concluded that the District Judge "must have" considered all prior credits or payments when issuing a 1980 judgment. In fact, counsel for the United States admitted in oral argument before the Court of Appeals that only those payments on the face of the tax returns, *not the seized property*, were ever presented to the District Court that entered the 1980 judgment. Consequently, the District Court concluded that taxpayers may not contest components of the assessment on their face, upon which interest continues to accrue. For all intents and purposes, as a consequence of these decisions, Petitioners may very well be exposed to *double liability* for taxes and interest.

The Court of Appeals so concluded despite a record showing gross arithmetical errors, the improper application

of interest to fraud penalties, and other inequitable errors -- tens of millions of dollars in the aggregate. Although framed in the language of *res judicata* by the District Court and the Circuit Court, this case illustrates the taxpayer's burden in dealing with the inertia of a United States Government bureaucracy. The right to be heard is rendered meaningless when the Government is in possession of the necessary, material facts upon which huge taxes are based, but *never* renders an accounting as to whether or in what manner seized assets have been applied to taxes or alleged deficiencies. Petitioners are not questioning the judgment of liability in this case. Instead, they are merely trying to determine whether that judgment has already been satisfied, in other words, *the extent of their liability.*

STATEMENT OF THE CASE

(a) Statement of the Facts.

This case began as a tax lien foreclosure suit by the Government against Harry S. Stonehill and a business associate, Robert P. Brooks. The controversy started in the early 1960's when the U.S. State Department recommended to the IRS that Stonehill's and Brooks' affairs be investigated, because embassy officials had concluded that they had an improper influence on Philippine affairs. Two hundred agents of the Philippine Government raided their business offices and confiscated all of the business records, most of which were evidently destroyed by a typhoon in 1970.

The Philippine Supreme Court decided unanimously that the seizure of records was unconstitutional in 1967. Nevertheless, the U.S. District Court and the Ninth Circuit Court of Appeals accepted the seized evidence. The IRS collection efforts were conducted on a worldwide scale. It

appears that approximately $15,000,000 in assets were acquired from the co-defendants between 1965 through 1988. Currently, the Receiver holds at least $3,000,000 in cash, and real property with an estimated value of $10-20,000,000.

In 1965, the United States Government commenced lien foreclosure proceedings in the U.S. District Courts for the Northern and Central District of California and the District of Hawaii. Motions to Suppress Evidence were denied. Also denied was a Petition for Certiorari to this Court, *Stonehill v. United States,* 405 F.2d 738 (9th Cir. 1969), *cert denied*, 395 U.S. 960 (1969), *rehearing denied*, 396 U.S. 870 (1969). After a pretrial hearing in 1974, the United States conceded that the tax assessment should be halved because of the Philippine Community Property law.

In 1975 the case was tried using only the bare jeopardy assessment as its basis. The District Court accepted the jeopardy assessment as correct and did not require the net worth computation to be proven. In 1976, the District Court made a finding of taxpayer liability with some adjustments including the community property credit. In 1980, the District Court issued an order confirming Harry S. Stonehill's liability at $8,984,668.48 as of January 31, 1980. The Court of Appeals for the Ninth Circuit affirmed the District Court's decision in 1983 on issues other than those which are the subject of this Petition. This Court denied Certiorari with respect to the other issues in 1984.

The Government did not prepare a Schedule of Tax Liability until February 3, 1988, four years after the denial of Certiorari by this Court. Because of the defects in the Schedule of Tax Liability and the lack of an accounting, the Receiver retained former IRS Agent Ragland, who had constructed the net worth statement, to account for the liability. Mr. Ragland was not permitted access to the IRS

collection files. His accounting admittedly contained large gaps in the available data. Said gaps have never been filled.

(b) Statement of the Proceedings.

This case has been in progress for more than 25 years. It has involved multi-district litigation, and numerous administrative levies and seizures of property in the United States by the IRS. Appeals were initiated previously because of the unconstitutional seizure of Petitioners Stonehills' business books and records in the Philippines. This Court ruled on the issue of suppression of evidence in 1984. None of the appeals were resolved in favor of Petitioners.

The collection efforts by the IRS in this matter were worldwide in scope. Virtually *all* of Petitioners' assets were placed under liens and acquired by levy. The IRS collected approximately $15,000,000 from Petitioners and codefendant Brooks. The tax deficiency calculated by the IRS on January 18, 1965 for Petitioners was $13,613,712. On October 15, 1980, the District Court concluded that the tax with fraud penalty and interest was $8,689,052. On February 3, 1988, the IRS issued a written Schedule of Tax Liability for Harry Stonehill in the amount of $16,451,761. Without explanation, in 1980, the IRS' Opposition brief in the District Court conceded that the tax should be lowered by millions of dollars. Counsel for the Government orally increased the amount allegedly due during argument before the Court of Appeals for the Ninth Circuit in 1992. The Government's rationale and methodology for calculating the taxes remains indecipherable and an outrage, because it has never been explained.

Petitioners accepted the total tax assessed by the 1980 District Court Judgment, but *repeatedly* asked for an accounting for the levies, seizures, and calculations because the only credits in the computation adopted by the District

Court judge in 1980 were payments made at the time of the original tax returns in 1959, 1960, and 1961. Petitioners assert that property worth millions of dollars was not accounted for by the IRS. The value of some assets levied but not taken into account plus interest should be in *excess* of $10,000,000. Several motions for an accounting were filed but not acted upon by the District Court.

The United States has contended that as to one of the motions filed on January 17, 1978, the District Court denied the motion by minute order dated May 5, 1978. At the hearing on the motion, held May 5, 1978, counsel for the United States promised to provide the requested accounting, stating that it was "99.9 percent complete and will be complete by the time we return." Four months later on August 1, 1978, counsel for the Petitioners received a *partial* accounting consisting only of various escrow funds created during the litigation of the case. In the transmittal letter, the Stonehills were advised that the Government "is still in the process of fully documenting all relevant transactions relating to these accounts" and that future information would be provided "as it becomes available."

The "partial accounting," which was finally provided to the Petitioners, however, consisted merely of statements of various bank accounts, only showing funds being deposited and withdrawn, *without further explanation as to the source* of *such funds*, the reasons therefore, or the uses to which such funds were put. Thereafter, counsel for the Stonehills met personally and spoke several times with the IRS, requesting that the accounting be completed. No further documentation was received during the next six months. On January 17, 1979, Petitioners filed a second Motion for an Order to Compel Accounting. After the Judgment became final, and following the Court's Order for Appointment of

Receiver, on June 26, 1984, the Petitioners filed a *third* Motion for Accounting on July 3, 1984. Subsequently, as part of their Opposition to the IRS' Motion for an Order Directing the Receiver to Distribute Funds to the United States, the Petitioners filed a *fourth* Motion for Accounting on November 29, 1985.

Several months later, in a Motion by Petitioners dated August 5, 1986, they requested that the IRS account for various monies and certain bank accounts and certificates of deposit as to the different taxpayers involved, and that the respective accounts be credited upon application of these funds toward the tax arrearages. Almost a year later, in July 1987, the Receiver also requested that the Treasury provide him with a current statement of these accounts. The persistent inaction of the Government and the District Court regarding Petitioners' requests for an accounting was utterly ignored by the Court of Appeals for the Ninth Circuit.

Finally, in desperation, the taxpayers tried to reconstruct the history of the taxes due in a submission of calculations accepted for filing by the District Court in 1991, but never addressed subsequently by either the District Court or the Court of Appeals. Petitioners analyzed their tax liabilities using computer programs approved by the IRS and data from the few IRS records available. Many errors were disclosed by that analysis including basic arithmetic errors by the IRS in excess of $10,000,000. A gross legal error was made as to the calculation of interest on the fraud penalty which was imposed for several years *before* the Tax Court rendered an opinion on the applicability of the fraud penalty. This error amounted to approximately $3,900,000. However, Petitioners' challenge to the arithmetic and interest calculations and other apparent discrepancies was ignored by

the United States, the District Court and the Court of Appeals.

It is apparent that property was unaccounted for in the IRS Schedule of Tax Liability. The original jeopardy assessment was calculated on a net worth basis. Copies of the levies on the items in the IRS net worth calculation show that few levies were *ever* accounted for after they issued. Nevertheless, the District Court failed to respond to motions for an accounting and refused to allow evidence of events occurring before the 1980 judgment. Because the interest continued to run on errors connected to events before 1980, the District Court's 1991 ruling effectively precluded an opportunity to be heard as to errors while interest continued to accrue.

The Petitioners, both directly and through the Receiver appointed by the District Court in 1984 to hold and convert assets, requested accountings before and after the 1980 judgment, but to no avail. The IRS accountant, Mr. Ragland, now retired, spent years analyzing the documents upon which the net worth calculations were based. Subsequently, Mr. Ragland was retained by the Receiver to assist in resolving this dilemma. However, he had access only to District Court records and admitted that there were large gaps in the financial data he had received. As set forth, *supra,* although Mr. Ragland had listed all of the Stonehills' assets in the 1965 net worth computation, he could shed no light on the fate of many of the same assets in October, 1988.

The denial by District Judge Panner of the Stonehills' motion asking the Court to declare the judgment satisfied and for other appropriate relief was appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals chose not to exercise its discretion in favor of Petitioners, despite

the clear authority of Fed.R.Civ.P. 60(b)(5) to do so. The Circuit Court, instead, limited the application of Fed.R.Civ.P. 60(b)(5) to narrow grounds while ignoring the exhaustive calculations submitted by Petitioners on the record in 1990 which challenged the 1988 IRS Schedule of Liability.

The burden should have been shifted to the *IRS* to give Petitioners the material facts which only the IRS had and still does have in its possession. Petitioners, *of necessity,* must have access to facts uniquely within the control of the IRS if they are to exercise their rights to procedural and substantive due process in this dispute as to $25,000,000 in credits and payments. The Ninth Circuit's decision gives the Internal Revenue Service license to play a game of "keep away" which is a perversion of justice and an ominous portent for any taxpayer so presumptuous as to challenge gross errors by the IRS. The behavior of the IRS should reach the conscience of this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ADOPTED A DISTRICT COURT RULING WHICH PERMITTED COLLECTION OF LARGE AMOUNTS OF TAXES BY THE IRS WITHOUT AN ACCOUNTING FOR LEVIES, SEIZURES AND MISTAKES, WHICH WERE KNOWN ONLY TO THE IRS, CONTRARY TO PETITIONERS' FIFTH AMENDMENT DUE PROCESS RIGHTS.

A. The Holding of the Court of Appeals for the Ninth Circuit is in Conflict with those of the Courts of Appeals for the First, Fourth and Seventh Circuits.

The Stonehills represent that millions of dollars of assets were levied upon or seized by the IRS during the course of the proceedings in this case. Although the great majority of these levies and seizures occurred before 1980, acknowledgment and accounting by the IRS for the assets levied and seized has *never* taken place. If a proper accounting had been performed, then the Stonehills further assert that the final summary of taxes due, set forth by the IRS in its first and only Schedule of Tax Liability of February 3, 1988, would be dramatically transformed, showing that the taxes *have* been satisfied.

The significance of the Stonehills' contentions as to IRS administrative levies and seizures is substantial because the Schedule of Tax Liability presented on February 3, 1988 and the mounting liability is, in large measure, *interest*. If the IRS served notices of levy and exercised ownership rights over the property levied upon, then a credit against tax liability should have accrued at least to the amount of the *appraised* value of the property so treated. Acts which demonstrate the exercise of ownership rights by the IRS include, *inter alia*: (a) to insure the properties levied upon; (b) to actually compel transfer of legal title; and (c) to rent the property or sell the property and take the proceeds. Whether or not such actions have been done by IRS is an issue of fact.

Title 26 U.S.C.A. § 6331(a) sets forth one of two methods the United States can employ to collect unpaid taxes once an assessment has been made and demand for payment refused. Section 6331(a) permits the IRS to

enforce a lien which arises on the property pursuant to § 6321 without judicial intervention where, as in the Stonehills' case, the property was subject to a jeopardy assessment. Although the language is less than clear, when the Government serves a notice of levy and exercises ownership rights, the taxpayer *should* receive a credit or be credited with payment against his tax liability. This is *especially* the case when a taxpayer can exercise no further dominion or control over his property thereafter. *United States v. Pittman,* 449 F.2d 623 (7th Cir. 1971).

Almost all the items and assets used to compute the Stonehills' net worth upon which the jeopardy assessment issued were the subjects of notices of levy. Service of a Notice of Levy constitutes a levy and seizure of the property. A levy is defined in § 6331(b) as: "The power to distrain and seize by any means."[1] *United States v. Eiland,* 223 F.2d 118, 121 (4th Cir. 1955); *Rosenblum v. United States,* 300 F.2d 843, 844-845 (1st Cir. 1962). The effect of the levy is to transfer constructive possession and equitable title to the property *immediately* to the Government. *United States v. Pittman,* 449 F.2d at 626, 627; *Phelps v. United States,* 421 U.S. 330, 337 (1975); *American Acceptance Corp. v. Glendora Better Builders,* 550 F.2d 1220, 1222 (9th Cir. 1977).

The Court in *Pittman* noted that pursuant to § 6332, any person holding property levied upon must surrender possession of it to the IRS without any further proceedings. If such a holder of assets does not surrender possession, then he is liable for the tax pursuant to § 6332(b). Seizure from a third person, therefore, operates as a payment of tax by that third person for the taxpayer. Similarly, a seizure from the

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1/ The notice states that the property is hereby "levied and seized."

taxpayer should operate as a payment by the taxpayer to the IRS.

The Court in *Pittman* further interpreted § 6332 as meaning that the property levied upon belonged to the Government, commenting that "[T]he Government went well beyond mere service of a notice of levy and actually seized control and dominion" over the properties. 449 F.2d at 627. When the Government engages in such activities, "so that the taxpayer can justly conclude he has no further right to deal with the property, there has been an effective levy and seizure within the meaning of § 6331(a), and the taxpayer is entitled to credit for the property seized." *Id.*

The taxpayer should receive credit in the amount of the property's value at the time the IRS *should have* sold it following levy and seizure. This is true despite the fact that taxpayer is not entitled to the proceeds from even a public sale until the proceeds are first applied to the satisfaction of the tax liability. *Id.* at 627, 628.

It follows, therefore, that where the property which was used in the computation of net worth has been levied and/or seized, as in the Stonehills' case, the taxpayers cannot be certain of their liability unless the Government reveals what property was seized and the disposition of the property levied and seized. In the instant case, such information has not been revealed after 25 years. Although motions for an accounting were *repeatedly filed*, the Federal Courts below ignored the pernicious effects of IRS refusals to render an accounting.

B. The Holding of the Court of Appeals for the Ninth Circuit Is in Conflict with Prior Holdings of This Court

If, pursuant to a levy and seizure of property, a credit should have been granted to the taxpayer, the IRS' refusal to give the taxpayer information peculiarly within IRS' control constitutes a deprivation of Fifth Amendment due process rights. A case pertinent to this issue is *Commissioner v. Samuel Shapiro,* 424 U.S. 614 (1974). The *Shapiro* case, like the instant one, involved assessment, levy, and/or seizure of taxpayer assets. The taxpayer claimed that the seizure of his assets by a jeopardy assessment caused him irreparable injury. This Court stated that under the Anti-Injunction Act, the taxpayer had a right to have an opportunity for a hearing, and that the IRS should show that the assessment had been made on a valid basis which would justify such a deprivation of due process rights:

> Our conclusion that the Court of Appeals correctly reversed the judgment of the District Court and remanded for further proceedings is fortified by the fact that construing the Act to permit the Government to seize and hold property on the mere good-faith allegation of an unpaid tax would raise serious constitutional problems in cases, such as this one, where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury. This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, *the Due Process Clause requires that the party whose property is taken be given an opportunity for some*

> *kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made.* Here the Government seized respondent's property and contends that it has absolutely no obligation to prove that the seizure has any basis in fact no matter how severe or irreparable the injury to the taxpayer and no matter how inadequate his eventual remedy in the Tax Court.

424 U.S. at 629-630. (Footnotes omitted.) (Emphasis added.)

Here, like *Shapiro,* the IRS has effectively precluded an opportunity for a proper post-deprivation hearing as to the validity of the deprivation. In *Shapiro,* the Court analyzed due process requirements in its dicta in *Phillips v. Commissioner,* 283 U.S. 589 (1931):

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate... Id.*, at 595, 596-597, 51 S.Ct., at 611. (Emphasis supplied.)

424 U.S. at 631-632.

In the Stonehills' case, as in *Phillips,* the seizures and proceedings constituted an unjustifiable deprivation of due process rights. There has been no opportunity to contest the computation by the IRS in any practical way. On the other hand, the tax liability estimates of the IRS itself have varied by tens of millions of dollars between 1988 and 1991. The Court's continuing repudiation of and indifference to the

motions for accounting in this case constitute a deprivation of the fundamental right to an adequate hearing.

The elements of due process have been set forth by this Court repeatedly in criminal and civil cases alike. For example, in *United States v. Salerno,* 481 U.S. 739 (1987), the Court defined the elements of procedural due process as follows:

> The Due Process Clause of the Fifth Amendment provides that "No person shall ... be deprived of life, liberty, or property, without due process of law...." This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). *When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). This requirement has traditionally been referred to as "procedural" due process.

481 U.S. at 746 (emphasis added.)

Due process, then, must be implemented in a fair manner. In Stonehills' case under the circumstances set forth

supra, implementation of due process was certainly inadequate and unfair. The Federal Courts' treatment of this matter does not pass muster.

Mathews v. Eldridge, 424 U.S. 319 (1976), was a case involving deprivation of Social Security benefits, which this Court has held to be protected by the Due Process clause of the Fifth Amendment. In *Mathews,* this Court stated the various factors which should always be considered in analyzing a controversy involving the deprivation of due process as to property rights. The factors include the private interests affected, the risk of an erroneous or wrongful deprivation of property, and the probable value, if any, of substitute procedural safeguards. Finally, in *Mathews,* this Court stated that the Government's proprietary interests in perfecting its functions must be weighed. The Stonehills have a significant and ongoing private interest in the property levied and seized. The Stonehills claim that, in fact, the tax has already been satisfied by the actions of the IRS and that there are no further safeguards allowing them to contest the errors they claim to exist in the tax liability stated by the IRS in 1988, 1990, and 1991.

Due process is not a fixed or definable concept unrelated to other circumstances, but, rather, must be analyzed on a case-by-case basis. In *Little v. Streater,* 452 U.S. 1 (1981), this Court decided that although a statute may be a legitimate exercise of state power, it must not be applied in a manner that deprives an individual of a protected right. In *Streater,* the indigent defendant could not afford the costs of a blood grouping test required in a paternity action. Consequently, he was judged to be the father. This Court decided that due process had been denied because, under the circumstances, no real opportunity to contest and to defend had been afforded defendant due to

the imposition of the cost requirement by the Government. In *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18 (1990), this Court considered a state excise tax law which penalized taxpayers. The law required them to pay first and obtain review later without a meaningful means of retroactive relief. This Court stated:

> The question before us is whether prospective relief by itself exhausts the requirements of federal law. The answer is no.: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, *the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.*

496 U.S. at 31.

In summary, the Stonehills assert that the legal process of jeopardy assessment, levy, and seizure, although legal and effective, resulted in a mass confiscation of property whose ultimate disposition is uniquely within the knowledge of the IRS. The IRS' failure to account for those assets over the course of thirty years has effectively precluded and frustrated any attempt by the Stonehills to exercise their due process rights. Such a deprivation of individual rights is inconsistent with the Constitution and the prior rulings of this Court.

II. THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE RULINGS OF THE COURTS OF APPEALS FOR THE SECOND, THIRD AND DISTRICT OF COLUMBIA CIRCUITS WITH RESPECT TO THE RES JUDICATA EFFECT OF THE DISTRICT COURT'S JUDGMENT WHEN A MOTION UNDER RULE FED.R.CIV.P. 60(B)(5) HAS BEEN FILED

The Stonehills filed a motion pursuant to Fed.R.Civ.P. 60(b)(5) to declare that the judgment had been satisfied and that a receivership be ended which was established to hold and convert assets estimated to be worth $20,000,000 to $30,000,00. The Stonehills did not dispute the finding of tax liability in the 1980 district judgment. However, the Stonehills had made repeated motions for an accounting, both *before and after* the 1980 judgment because *the judgment on its face did not include credits for payments that had been made on the record.*

The Stonehills asserted that the only payments noted in the computation of tax for the 1980 judgment were those payments made in the 1958, 1959, and 1960 tax returns. No credit at all was given for property levied and seized *or* for many subsequent payments. In support of the motion, a memorandum and a large submission of calculations reconstructing the tax history were filed. The calculations were used to reconstruct from the record what the Stonehills' tax liability *should have* been. They were further intended to demonstrate that the judgment had been satisfied and that a refund was due the Stonehills.

The Government, rather than answering the calculations, raised issues of *res judicata* and *collateral estoppel* as bars to consideration of the challenge to its 1988

Schedule of Tax Liability. The Stonehills relied on the argument that the purpose of Fed.R.Civ.P. 60(b)(5) was to prevent double recovery on a judgment, citing authority from this Court and other Circuits. *E.g., United States v. Montana,* 440 U.S. 147 (1979); *Sunderland v. City of Philadelphia,* 575 F.2d 1089, 1090 (3rd Cir. 1978). The subsidiary purpose of Fed.R.Civ.P. 60(b)(5), the Stonehills maintained, was to eliminate payment of interest on debts which had already been paid and to prevent a windfall recovery. *Candiano v. Moore-McCormick Lines, Inc.,* 407 F.2d 385 (2nd Cir. 1969).

Furthermore, it was the position of the Stonehills that each case should be analyzed to determine if the motion had been made in a reasonable time after the judgment in accordance with *United States v. Holtzman,* 762 F.2d 720, 725 (9th Cir. 1985). An analysis of the many motions for an accounting by the taxpayers *before and after* the 1980 judgment and the failure of the IRS and the Courts to respond to those motions was submitted with the memorandum.

The Government argued that the Stonehills' request was barred by *res judicata*, and that the law of the case effectively denied an opportunity for relief. The Stonehills contended that the United States was wrong because in the case of *res judicata* the cases relied upon by the United States (*United States v. Montana,* 440 U.S. 147 (1979), and *Hooker v. Kline,* 573 F.2d 1360, 1367 (9th Cir. 1978), *cert. denied* 439 U.S. 932 (1978)), clearly state that additional actions based on the same claim are barred in a *subsequent* proceeding. The Stonehills replied that their motion under Fed.R.Civ.P. 60(b)(5) was in the *same* continuing proceeding of which the District Court's 1980 judgment was but a part. In addition, the Stonehills pointed out that the *law of the case* doctrine (issue preclusion) does not bar the Stonehills' claim

because taxpayers questioned the *facts* of payment *not legal issues*. An essential element of law of the case doctrine is that *legal issues* are barred from reconsideration *not* factual issues.

The Ninth Circuit Court of Appeals interpreted the cases upon which it relies in its opinion[2] (App. at A-4), contrary to the meaning given those cases by the Circuit Courts that decided them. In referring to *Sunderland v. City of Philadelphia*, 575 F.2d 1089 (3rd Cir. 1978); *Kassman v. American University*, 546 F.2d 1029 (D.C. Cir. 1976); and *Snowden v. D.C. Transit System, Inc.*, 454 F.2d 1047 (D.C. Cir. 1971), the Court of Appeals for the Ninth Circuit interpreted the decisions to mean that the relief granted under Fed.R.Civ.P. 60(b)(5) must concern only situations where payments or events occurred *after* the entry of judgment against the defendant.

Such an interpretation is contrary to the decisions reached by the Circuit Courts of Appeals in question. Actually, in each of those cases, *Sunderland, Kassman, and Snowden, supra*, the payments in question were made prior to the judgments then at issue -- as in the Stonehills' case. The principle enunciated by the Ninth Circuit is in conflict with the decisions reached in each of the cited cases by the other Circuits. The Ninth Circuit, moreover, introduced a novel theory that payments in Fed.R.Civ.P. 60(b)(5) cases were traditionally from an independent source, failing to note that the Stonehills' payments came as a result of levies upon third parties, *also* independent sources. The distinction at any rate as to the independent source of the payments is unavailing if it is at all pertinent.

2/ All references made to the Appendix herein are referenced as "App. at ____."

The Court of Appeals for the Ninth Circuit concluded that the precedents established in *Redfield v. Insurance Company of North America,* 940 F.2d 542 (9th Cir. 1991); and *Dias v. Bank of Hawaii,* 732 F.2d 1401 (9th Cir. 1984), both stood for the proposition that a Fed.R.Civ.P. 60(b)(5) motion seeking relief from a judgment was dependent on events occurring *after* a *judgment* was entered. However, *Sunderland, Kassman, and Snowden* all concerned actions and payments prior to the judgment, exactly as in Stonehills' case.

The distinction drawn by the Ninth Circuit as to *independent sources* of payments and credits is not controlling, because the cases cited by the Ninth Circuit all involved parties *directly* involved in the action as the source of the payments, *not* independent parties. Assuming, *arguendo,* that the Court's "independent source" theory is correct, levies and seizures in the Stonehills' case resulted in effect from payments by third parties, *i.e.,* independent sources holding the Stonehills' assets and interests.

Consequently, when interpreting the *res judicata* and *law of the case* doctrines, the Court of Appeals for the Ninth Circuit is in conflict with other Circuits which have holdings as to these issues. Fed.R.Civ.P. 60(b)(5) can be invoked for relief (1) from a judgment that has been satisfied by events and payments occurring before it was entered; and (2) regardless of the independence of the sources of payment.

III. THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT BECAUSE IT APPROVED THE DISTRICT COURT'S DECISION THAT A JUDGMENT OF TAX LIABILITY CONTAINING OBVIOUS LEGAL ERRORS WITH LARGE FINANCIAL EFFECTS HAD RES JUDICATA EFFECT

It is indisputable that the computation supporting the only accounting offered by the IRS in the Schedule of Tax Liability of February 3, 1988 contained multiple errors. The Petitioners' Memorandum in Support of the Motion to Declare the Judgment Satisfied on August 22, 1990, contained over 100 pages of summary calculations and computer runs with 20 attachments from the record in the District Court. The Stonehills tried to reconstruct their tax liabilities in the absence of cooperation from the IRS. Ten categories of disagreement with the IRS February 1988 Schedule of Tax Liability were set forth in great detail in Petitioners' submission of August 22, 1980. IRS calculations of the tax claimed to be due in the February 3, 1988 Schedule of Tax Liability totalling approximately $15,000,000, were analyzed. The value of the assets which the Stonehills had reason to believe had been seized were factored into the analysis.

Petitioners claimed that the taxes had been satisfied. The mere halt of interest accruing due to the credits for levies and seizures caused a major reduction in the amount due. A large error cited in the calculations was the inappropriate application of interest to the fraud penalty with an effect on the liability of more than $3,900,000. The Stonehills relied upon established practice and precedent

which provides that if a taxpayer files a timely petition with the United States Tax Court, then interest does not accrue on penalties and additions to tax due until the Tax Court decision is *final*. *See 26 U.S.C.* § *6601(a),(e)(2),(e)(3).* In the Stonehills' case, a timely petition *was* filed and the matter was contested until a Tax Court judgment was made final on June 28, 1984.

Decker v. The United States, 531 F.2d 543 (U.S. Ct. Cl. 1976) stands for the proposition that interest cannot accrue on the fraud penalty assessed against the Stonehills until *after* the Tax Court decision in their case became final. In *Decker,* the IRS issued jeopardy assessments against the taxpayer in 1972 for the tax years 1962, 1963, and 1964. The jeopardy assessments included a § 6653(b) addition to tax because of a fraudulent return. The Court of Claims, predecessor to the Court of Appeals to the Federal Circuit, in *Decker* declared that the payment due date for a tax subject to a jeopardy assessment is the date that such tax would have been payable in the absence of a jeopardy assessment. Interest could only accrue from the date of the decision of the Tax Court *despite* the jeopardy assessment.

The District Court and the U.S. Court of Appeals in this case had before them briefs *and* the submission of computations made by the Stonehills. The Stonehills challenged the IRS calculation, *inter alia*, because of a premature effective date used by the IRS for the application of interest to the fraud penalty. This acted to the extreme detriment of the taxpayers. Nevertheless, both the District Court and the Court of Appeals ignored the effect of premature interest on the fraud penalty. In this case, the Court of Appeals for the Ninth Circuit has approved an IRS decision to apply interest on the fraud penalty against the Stonehills years in advance of the issuance of the Tax Court's

decision. Accordingly, the Court of Appeals for the Ninth Circuit is in conflict with the decision in *Decker* by the Court of Claims, the predecessor to the Court of Appeals for the Federal Circuit.

CONCLUSION

For the above stated reasons, Petitioners Harry S. Stonehill and Lourdes Blanco Stonehill respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on the three questions presented.

Respectfully submitted,

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Dated: July 6, 1992

APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 91-35049
v.	)	D.C. No. CV 65-0127-OMP
HARRY S. STONEHILL; ROBERT P. BROOKS, et al.,	)	MEMORANDUM*
Defendants-Appellants.	)	
JEROME S. KATZIN,	)	
Receiver.	)	

Appeal from the United States District Court
for the Northern District of California
Owen M. Panner, District Judge, Presiding
Argued and Submitted March 3, 1992
Portland, Oregon

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: HALL, O'SCANNLAIN, and LEAVY, Circuit Judges.

Harry Stonehill and Robert Brooks (collectively "Stonehill") appeal the district court's denial of their Federal Rule of Civil Procedure 60(b)(5) motion. Stonehill sought a declaration that the United States' judgment for income taxes entered October 14, 1980, was satisfied and that the receivership be terminated. *See United States v. Stonehill,* 420 F. Supp. 46 (C.D. Cal 1976), *aff'd in part and rev'd in part,* 702 F.2d 1288 (9th Cir. 1983), *cert. denied,* 465 U.S. 1079 (1984). We have jurisdiction under 28 U.S.C. § 1291,[1] *See, e.g., Robertson v. Protective National Ins.,* 882 F.2d 421, 421 (9th Cir. 1989), and we affirm.

While we recognize the magnitude and complexity of this ongoing dispute, the case is before us on the very narrow question of whether the district court properly denied Stonehill's Rule 60(b)(5) motion. We review the district court's denial of a Rule 60(b)(5) motion for an abuse of discretion. *See Transgo, Inc. v. Ajac Transmission Parts Corp.,* 911 F.2d 363 (9th Cir. 1990). "A district court abuses its discretion by making a clear error of law." *United States v. Washington,* 935 F.2d 1059, 1061 (9th Cir. 1991). This court may affirm the district court on any grounds supported by the record even when that ground was not the basis for the district court's decision. *See Swenson v. United States Postal Serv.,* 890 F.2d 1075, 1077 n. 1 (9th Cir. 1989).

1/ Our jurisdiction is not pursuant to 28 U.S.C. § 1292(a)(2). *See S.E.C. v. American Principals Holdings, Inc.,* 817 F.2d 1349, 1351 (9th Cir. 1987) (statute interpreted narrowly to apply only to orders refusing to take steps to accomplish purposes of winding up receiverships).

Stonehill contends he is not seeking a modification of Judge Solomon's determination of liability; rather, he is merely asking for a determination that the taxpayers have satisfied the judgment. In so doing, however, Stonehill asked the court to credit amounts allegedly paid prior to the judgment, and to recalculate the accrued interest.

In their brief, taxpayers state that the district court prevented them "from proving that the 1980 judgments were erroneous as to the amount actually owed to the [United States]." Taxpayers also assert that "[h]earings and correspondence leading up to the 1980 judgments confirm that, in entering the judgments, Judge Solomon did not consider any prior payments or credits." Contrary to their assertions, taxpayers are attempting to alter or amend the judgment entered by Judge Solomon. They argue, in effect, that if the 1980 judgment properly incorporated certain payments made, and taxpayers had received credit for those payments at the time they were allegedly made, the judgment is now satisfied. To grant relief under that theory, we would have to conclude that the judgment was erroneous, or rendered by mistake or inadvertence. At the time Judge Solomon entered the judgment, relief was available to the taxpayers on those grounds by way of a timely Rule 59(e) motion, or a timely Rule 60(b)(1) or (b)(2) motion, or on direct appeal.

Rule 60(b)(5) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reason[]... the judgment has been satisfied...." Fed. R. Civ. P. 60(b)(5). Stonehill does cite any other authority as a basis of his motion. The rule simply does not extend to the situation before us. Generally, Rule

60(b)(5) is invoked by a party seeking relief from a judgment that has been satisfied due to events or payments occurring after it was entered. *See, e.g., Redfield v. Insurance Co. of N.A.*, 940 F.2d 542 (9th Cir. 1991); *Dias v. Bank of Hawaii*, 732 F.2d 1401 (9th Cir. 1984). We note that courts have also granted relief under Rule 60(b)(5) because of satisfaction in situations where the judgment entered against the defendant had, in effect, been partially satisfied from an independent source. *See Sunderland v. City of Philadelphia*, 575 F.2d 1089 (3rd Cir. 1978); *Kassman v. American University*, 546 F.2d 1029 (D.C. Cir. 1976); *Snowden v. D.C. Transit System, Inc.*, 454 F.2d 1047 (D.C. Cir. 1971). Courts have refused to grant Rule 60(b)(5) relief in circumstances where the defendant is alleging the judgment is satisfied due to circumstances that could have been properly considered by a Rule 59(e) or 60(b)(1) motion, *see William Skillings & Assoc. v. Cunard Transp., Ltd.*, 594 F.2d 1078 (5th Cir. 1979), or should have been raised at trial. *See Willits v. Yellow Cab Co.*, 214 F.2d 612 (7th Cir. 1954). Significantly, Stonehill does not cite to any authority for the operation of Rule 60(b)(5) sought in this case. In rendering the judgment against taxpayers, Judge Solomon must have necessarily considered any payments allegedly made to the Government up to that point. Under these circumstances, we are unwilling to permit taxpayers to go behind that judgment to argue satisfaction of the judgment on the basis of a Rule 60(b)(5) motion filed ten years after entry of that judgment.

While taxpayers' precise contentions concerning payments are not altogether clear, it appears to rest almost entirely on payments allegedly made prior to the judgment. To the extent taxpayers are contending that payments were made post-judgment and not credited against the judgment, we find no evidence in the record of amounts

paid other than what the Government concedes were paid. When given the opportunity in the district court, Stonehill failed to offer specific evidence to support the contention that there were unaccounted for post-judgment payments.

The district court's denial of Stonehill's Federal Rule of Civil Procedure 60(b)(5) motion is affirmed.

AFFIRMED.

Dated: April 7, 1992

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 91-35049
v.	)	D.C. No. CV 65-0127-OMP
HARRY S. STONEHILL; ROBERT P. BROOKS, et al.,	)	ORDER
Defendants-Appellants.	)	
JEROME S. KATZIN,	)	
Receiver.	)	

Before: HALL, O'SCANNLAIN, and LEAVY, Circuit Judges.

The petition for rehearing is DENIED.

Dated: May 14, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	Civil No. 432-44
Plaintiff,	)	(N.D. Cal.)
	)	Civil No. 65-127
v.	)	(C.D. Cal.)
	)	Civil No. 2348 (Hawaii)
HARRY S. STONEHILL, et al.,	)	ORDER
Defendants.	)	

PANNER, J.

Defendants' motion for a declaration that they have satisfied the judgment for taxes due and that the receivership should be terminated is denied.

IT IS SO ORDERED.

DATED this 2nd day of January, 1991.

/s/ OWEN M. PANNER,
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	Civil No. 432-44
Plaintiff,	)	(N.D. Cal.)
	)	Civil No. 65-127
v.	)	(C.D. Cal.)
	)	Civil No. 2348 (Hawaii)
HARRY S. STONEHILL, et al.,	)	OPINION
Defendants.	)	

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PANNER, J.

Plaintiff United States brings this action to foreclose income tax liens against defendants Harry S. Stonehill and Robert P. Brooks, for taxes and penalties due for 1958 through 1961. Defendants move for a declaration that they have satisfied the judgment for taxes due and that the receivership should be terminated. I deny defendants' motion.

BACKGROUND

The parties disagree on the amount of defendants' tax liability. Defendants contend that as of July 30, 1990, plaintiff owes refunds of $4,748,105.94 to Brooks and $11,573,939.54 to Stonehill. Plaintiff contends that each defendant owes $18 million.

Defendants' tax liabilities stem from their Philippine businesses. *See United States v. Stonehill,* 702 F.2d 1288, 1290-93 (9th Cir. 1983), *cert. denied,* 465 U.S. 1079 (1984). Defendants made millions in sales, commissions, rebates, and kickbacks because they held a monopoly on sales of American tobacco in the Philippines.

> [B]etween 1958 and 1961, millions of dollars from various Philippine business dealings passed through the taxpayers' hands. Much of this money came from illegal and unrecorded sources.... Over nine million dollars flowed through black market channels to secret Swiss bank accounts and "shell" companies. Some of this money paid expenses of USTC in the United States. About four million of these dollars were invested in American real estate and securities. During these years the taxpayers reported combined incomes of less than $200,000.

Id. at 1291 (footnotes omitted).

Plaintiff assessed income tax liabilities against defendants on January 18, 1965. On January 25, 1965, plaintiff filed these three actions to foreclose assets owned by defendants. On April 9, 1965, the parties stipulated to an

order prohibiting defendants from transferring their property or assets then in the United States out of United States territory. Reply Brief, Exh. A, at 5, § 4(a). Plaintiff agreed not to liquidate, sell or otherwise dispose of defendants' property or assets, pending final disposition.

On April 8, 1976, Judge Gus J. Solomon determined that defendants were liable for unpaid taxes and fraud penalties, and that the tax liens could be foreclosed against defendants' conjugal properties. *United States v. Stonehill,* 420 F. Supp. 46 (C.D. Cal. 1976), *aff'd in part and rev'd in part, United States v. Stonehill,* 702 F.2d 1288 (9th Cir. 1983), *cert. denied,* 465 U.S. 1079 (1984). Judge Solomon ordered the parties to "compute the taxes and penalties due the United States." 420 F.Supp. at 64.

On October 14, 1980, Judge Solomon entered a judgment. He ordered that Stonehill pay $8,984,668.48 for income taxes, penalties, and interest to January 31, 1980, with interest accruing on $4,926,925 after January 31, 1980. He ordered that Brooks pay $8,667,658.29 for income taxes, penalties, and interest to January 31, 1980, with interest accruing on $4,743,789 after January 31, 1980. The judgment stayed foreclosure on plaintiff's liens against defendant's assets until the judgment was affirmed by the highest court with jurisdiction or until the time for filing a notice of appeal or petition for certiorari had expired.

On December 5, 1980, defendants filed notices of appeal. On September 30, 1983, the Ninth Circuit issued a mandate affirming in part and reversing in part. *See United States v. Stonehill,* 702 F.2d 1288 (9th Cir. 1983), *cert. denied,* 465 U.S. 1079 (1984). The court reversed only the disposition of certain third-party interests, and affirmed on all other issues.

In April 1984, defendants moved for relief from judgment. This court denied the motions. The Ninth Circuit dismissed defendants' appeals of the denial.

STANDARDS

Federal Rule of Civil Procedure 60(b)(5) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . .
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application .... A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Rule 60(b)(5) supports motions to credit the amount of a previous judgment or settlement against another judgment. *Torres-Troche v. Municipality of Yauco,* 873 F.2d 499, 501 & n. 7 (1st Cir. 1989). A motion under Rule 60(b)(5) "'does not allow relitigation of issues which have been resolved by the judgment.'" *Transgo, Inc. v. Ajac Transmission Parts Corp.,* 911 F.2d 363, 365 (9th Cir. 1990) (quoting *Money Store, Inc. v. Harriscorp Fin., Inc.,* 885 F.2d 369, 372 (7th Cir. 1989)).

DISCUSSION

I. Res Judicata (Claim Preclusion)

Plaintiff argues that Judge Solomon's 1980 judgment became final in 1984 when the Supreme Court denied defendants' petition for certiorari. Plaintiff contends that the judgment precludes defendants' challenge to the interest and penalties owing up to 1980. Defendants respond that the judgment was not final.

A prior judgment precludes further actions based on the same claim if (1) it is a final judgment, (2) on the merits, (3) in a subsequent action with the same parties or those in privity with them, and (4) is based on the same claim. *Hooker v. Klein,* 573 F.2d 1360, 1367 (9th Cir.), *cert. denied,* 439 U.S. 932 (1978). However, claim preclusion does not apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate the claim. *People of State of Cal. v. F.C.C.,* 905 F.2d 1217, 1245 (9th Cir. 1990).

According to defendants, the 1980 judgment decided only (1) the amount of taxes owed; (2) the foreclosure of tax liens against conjugal property; (3) the priority of tax liens over defendants' attorney's liens; and (4) the disposition of third-party claims. Defendants contend that the 1980 judgment was not final because plaintiff has not done an accounting, despite their repeated motions for an accounting. Defendants also contend that the court cannot enter a final judgment until the receivership is dissolved and a final accounting completed.

The 1980 judgment did determine the amounts of taxes, penalties, and interest owing to the date of judgment. Defendants' counsel did not object to the form of the judgment in 1980 or on appeal, although they did not hesitate to point out other perceived errors. Defendants

contend that they assumed the figures would be corrected when plaintiff did a complete accounting. However, defendants' assumption does not justify their failure to object. By its own terms, the judgment took effect when the time for further appeals expired.

II. Law of the Case

Defendants also argue that res judicata does not apply because no final judgment has been entered. Even if res judicata does not apply, I will not disturb the findings of fact in the 1980 judgment.

The law of the case controls unless "the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different." *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989). Here, although defendants have submitted various documents, they have not shown that the judgment was clearly erroneous, or pointed to substantially different evidence. The judgment's findings are the law of the case. There is no reason to go behind those findings.

CONCLUSION

Defendants' motion for a declaration that they have satisfied the judgment for taxes due and that the receivership should be terminated is denied.

Dated this 2nd day of January, 1991.

/s/ OWEN M. PANNER,
United States District Court Judge